

STATE OF MICHIGAN
COURT OF APPEALS

STATE AUTOMOBILE MUTUAL INSURANCE
COMPANY,

UNPUBLISHED
February 14, 2003

Plaintiff-Appellee,

v

GEOFFREY FIEGER, FIEGER FIEGER &
SCHWARTZ PC, and FIEGER FIEGER
SCHWARTZ & KENNEY PC,

No. 231590
Oakland Circuit Court
LC No. 99-019360

Defendants-Appellants.

Before: Jansen, P.J. and Hoekstra and Gage, JJ.

PER CURIAM.

Defendants Geoffrey Fieger, Fieger, Fieger & Schwartz P.C. and Fieger, Fieger, Schwartz & Kenney P.C. (“defendants” or “the Fieger defendants”) appeal as of right the December 4, 2000 order granting plaintiff State Automobile Mutual Insurance Company’s (“plaintiff” or “State Auto”) motion for reconsideration and reinstating plaintiff’s complaint. We reverse.

1. Facts and Proceedings

The present case arises from a dispute between plaintiff and defendants over a collateral source lien filed by plaintiff in the *Rogers v City of Detroit* case, which involved a wrongful death action brought against the City of Detroit *et al.* for death of John Rogers, a 34 year old attorney, on June 17, 1988. See *Rogers v City of Detroit*, 457 Mich 125; 579 NW2d 840 (1998). Rogers was killed when a Detroit Police officer, disregarding a stop sign during a high-speed police chase of another car, broadsided Rogers’ car. Defendants represented Mrs. Carol Rogers, the personal representative of her deceased husband’s estate, in the wrongful death action filed in Wayne Circuit Court on July 3, 1990. The wrongful death action resulted in a 1992 jury verdict in excess of \$6.1 million dollars following a trial before Wayne Circuit Court Judge Michael J. Callahan. Plaintiff did not intervene or otherwise participate in the wrongful death action.

At the time of his death, Rogers was covered by a \$500,000 insurance policy from plaintiff for uninsured motorist benefits. Plaintiff paid \$450,000 in uninsured motorist benefits

to the deceased's estate and filed a notice of lien in the wrongful death action as a collateral source under MCL 600.6303.

Before the entry of judgment in the wrongful death action, the defendant City of Detroit filed a post-trial motion to reduce the judgment by the amount of the collateral source payments, including the amount paid by plaintiff. In response to this motion, the Fieger defendants acknowledged that by law, State Auto, as a collateral source lien holder under MCL 600.6303, was entitled to the money "plus interest." Judge Callahan ordered that the total amount of the collateral source payments be placed into an escrow account "at such time as the judgment herein is paid," indicating that the "amount of set-off to be placed in escrow for lien-holders" and that the "[a]mount of judgment stays the same." Following appellate proceedings in this Court and the Supreme Court, the jury verdict in the wrongful death action was affirmed. With interest, the verdict was in excess of \$11.4 million.

During the appellate proceedings, the City of Detroit challenged Judge Callahan's ruling that the collateral source lien-holders were entitled to reimbursement from the total judgment under MCL 600.6303. According to the City, it was entitled to have the judgment reduced by the amount of the collateral sources. The Michigan Supreme Court rejected the City's position, affirming Judge Callahan's decision that the collateral source lien-holders were entitled to seek reimbursement under the statute. The Supreme Court remanded the case to the Wayne Circuit Court with the instruction that any "outstanding liens will be satisfied upon the payment of the judgment to Plaintiff." *Rogers, supra*, 457 Mich at 158.

On July 1, 1998, the Wayne Circuit Court ordered the City of Detroit to place the collateral source funds in an escrow account. On September 22, 1998, plaintiff filed a petition for release of the funds held in escrow, seeking reimbursement of the full amount of its lien as well as all interest earned.

A hearing on this petition was held by Judge Callahan on October 23, 1998. At the hearing, State Auto's attorney, Mr. Michael Condit, argued that the trial court should release \$450,000 from the escrow account directly to State Auto. Specifically, Mr. Condit advised the court that if it released the funds to the estate, he feared that Mr. Fieger would improperly withhold part of the amount as a pro-rata share of costs and attorney fees. During the hearing, Mr. Fieger acknowledged that State Auto had a "justifiable lien by contract" and was entitled to its money "plus interest" less his attorney fee. In response, Judge Callahan, stating that the issue of attorney fees and costs was "not before me" because no motion had been filed, denied State Auto's request to have the funds released directly to it. Although Judge Callahan decided to disburse the funds to the estate, he advised State Auto's counsel that "if Mr. Fieger takes an attorney fee and he's not entitled to it, I'm perfectly capable of putting it back in your pocket."

An order disbursing funds held in escrow was then entered on November 9, 1998. Thereafter, an order authorizing the disbursement of the escrow funds to the Fieger defendants was entered on November 24, 1998. As defendants point out, State Auto did not ask for reconsideration of these orders, nor did it appeal them.

On December 4, 1998, the Fieger defendants sent a check in the amount of \$299,157.46 to State Auto in payment of the lien amount. Included with the check was a letter explaining defendants' position that State Auto "owes a percentage of the costs and one-third of the attorney

fee.” State Auto immediately disputed Mr. Fieger’s deduction for an attorney fee and costs, prompting Mr. Condit and Mr. Fieger to exchange correspondence regarding the amount in dispute. Although Mr. Condit suggested that the disputed amount should be placed into a separate account until the issue was resolved, he did not bring the matter before Judge Callahan.

On January 6, 1999, Judge Callahan held a hearing on the Rogers estate’s motion regarding the distribution of the proceeds in the wrongful death suit. Mr. Fieger was present at the hearing representing the estate, while State Auto did not receive notice of the hearing and thus was not present. At the hearing, Mrs. Rogers, in response to Mr. Fieger’s questioning about the distribution, acknowledged that she owed the Fieger defendants an attorney fee in the amount of \$3,540,530.23. Mr. Fieger then questioned Mrs. Rogers:

That leaves a balance totaling \$7,081,060.47. And you understand that there were two lien holders who asserted liens in this case. Those being State Auto for \$450,000, and the Accident Fund which also was the – is the Workmen’s [sic] Comp carrier. And do you understand that we have negotiated those and made payments to State Auto and Accident Fund in the amount of \$141,687.57, and to State Auto of \$299,157.46; do you understand that?

Mrs. Rogers responded affirmatively. Following the hearing on January 6, 1999, Judge Callahan entered an order distributing the proceeds of the judgment in the wrongful death suit, authorizing the distribution of \$299,157.46 to State Auto as a third-party lien-holder.

Subsequently, approximately one year later on December 2, 1999, State Auto filed a four-count complaint in Oakland Circuit Court, seeking legal, equitable and declaratory relief against defendants in connection with the disputed lien amount. Specifically, State Auto alleged that defendants violated their fiduciary duties and an equitable trust (Count I); committed contempt of court (Count II); converted money rightly due and owing to State Auto (Count III); and owed State Auto an accounting (Count IV). State Auto sought declaratory relief, interest on the funds in question, reimbursement of the money that was wrongly withheld as attorney fees and costs, and exemplary damages. The case was assigned to Oakland Circuit Court Judge Nanci J. Grant.

According to defendants, State Auto’s action of filing a lawsuit in Oakland Circuit Court, and not before Wayne Circuit Court Judge Callahan, represented nothing less than forum shopping. As a result, defendants, in response to plaintiff’s complaint, filed a motion for a change of venue, arguing that the Oakland Circuit Court was without jurisdiction pursuant to MCR 2.227 because plaintiff’s action involves issues that were previously raised before Judge Callahan in the *Rogers* wrongful death suit. Specifically, defendants claimed that State Auto’s lawsuit was a claim for a lien arising out of a lawsuit that arose and was litigated in Wayne County. In response to defendants’ change of venue motion, State Auto argued that venue was proper in Oakland Circuit because none of the parties to the present action were parties to the underlying Wayne Circuit action and that none of the issues involved in the present lawsuit were litigated in that case. In an order entered on January 19, 2000, Judge Grant denied defendants’ motion for a change of venue.

In the meantime, defendants also filed a motion for summary disposition on January 6, 2000, arguing that the Oakland Circuit Court lacked subject matter jurisdiction pursuant to MCR 2.613(B) and also claiming that plaintiff’s suit should be dismissed on the basis of collateral

estoppel and accord and satisfaction. A hearing on defendants' motion for summary disposition was held on February 23, 2000. In an order dated February 28, 2000, Judge Grant denied defendants' motion for summary disposition "with prejudice" regarding defendants' claims that plaintiff's complaint was barred by collateral estoppel and accord and satisfaction. Judge Grant also denied defendants' motion "without prejudice insofar as it [sic] argued that the Court lacks jurisdiction pursuant to MCR 2.613(B) for the reasons stated on the record." At the hearing, Judge Grant stated that more factual development was necessary, indicating that she would revisit this issue once it received a "detailed history of the post-verdict Circuit Court proceedings both in 1992 and 1998 as well as an analysis of the interplay between MCR 600.6303 and MCR 600.2922."

Defendants again moved for summary disposition, raising many of the same issues that were addressed in their first motion. This time, by an opinion and order dated July 10, 2000, Judge Grant granted defendants' motion for summary disposition under MCR 2.116(C)(7) on the basis of collateral estoppel. Although Judge Grant concluded that defendants were not legally entitled to a portion of State Auto's line in the form of an attorney fee under MCL 600.6303, she concluded that State Auto was collaterally estopped from recovering the wrongfully withheld money. Specifically, Judge Grant stated:

The more difficult question is whether the issues in the Wayne County trial court were "substantially identical" to those in the present case. On one hand, it is clear that the trial judge never explicitly ruled on whether Defendants were entitled to an attorney fee. Rather, the court simply entered a judgment for the entire verdict amount in favor of the estate, with instructions that the estate satisfy the liens. On the other hand, the issue in the underlying case could just as easily be characterized as whether the trial court properly applied MCL 600.6303 in determining the amount of the estate's judgment. The trial court explicitly ruled on that issue when it entered a judgment for the estate in the amount of the entire verdict, a ruling which State Auto was free to appeal. That issue is identical to the issue raised in this proceeding.

State Auto then filed a motion for clarification and for rehearing and/or reconsideration on July 24, 2000, claiming that Judge Grant, in her July 10, 2000 opinion and order, improperly overruled her own previous February 28, 2000 order, which denied defendants' collateral estoppel motion "with prejudice," that the court failed to address any of the allegations in State Auto's complaint and that the court misapplied the doctrine of collateral estoppel because it misunderstood the underlying factual record.

Thereafter, in an opinion and order dated November 30, 2000, Judge Grant granted State Auto's motion for reconsideration and reinstated its complaint. In pertinent part, Judge Grant stated:

The Court remains convinced that the issues in the second action are identical, not merely similar, to the issues in the first. In both actions, State Auto asserts nothing more than subrogation rights (i.e., a claim that it was entitled to a portion of the total damage award because that award included compensation which State Auto had already paid the Estate). The legal basis for State Auto's claim in this case is identical to the legal basis for its claim in the underlying case.

The Court is now convinced, however, that the subrogation issues raised in this case were not “actually and necessarily litigated” in the first action. The only time those issues were addressed was in the context of State Auto’s “petition for release of funds held in escrow.” While State Auto argued in that petition that it was entitled to recover the full amount of its lien, the trial court simply did not address the issue. Rather, the Court simply ruled that the Estate’s judgment against the City would be for the full amount of the verdict, and would not be reduced by the amount of the lien. The implication, of course, was that State Auto would have to pursue its claim directly against the Estate should disputes arise regarding the amount due.

In other words, it is clear that State Auto attempted to litigate its subrogation rights in the underlying action by filing the “petition for release of funds held in escrow.” The trial court, however, precluded resolution of the parties’ rights to the lien proceeds when it refused to apply MCL 600.6303 as written. Thus, decisions regarding the extent of State Auto’s subrogation rights were neither actually nor necessarily litigated in the context of State Auto’s petition.

Nor was the extent of State Auto’s subrogation rights “actually and necessarily litigated” in the proceedings that followed. Those proceedings, after all, were held without notice to or participation by State Auto.

In light of the foregoing, the present case does not implicate both collateral estoppel elements. Therefore, that doctrine should not have been applied to bar State Auto’s claim.

Defendants then filed an interlocutory application for leave to appeal on December 22, 2000, urging this Court to reverse Judge Grant’s order reinstating State Auto’s complaint by arguing that Michigan courts have applied the doctrines of res judicata and collateral estoppel not only to claims actually raised in the prior action but also to “every claim arising out of the same transaction which the parties, exercising reasonable diligence, could have raised but did not.” Specifically, defendants claimed that the issue regarding the collateral source lien was raised in the previous Wayne Circuit Court action, that State Auto had every opportunity to assert its rights in that proceeding, and that State Auto abandoned its claim by not filing any motion or appeal from Judge Callahan’s order distributing the funds.

State Auto responded to defendants’ interlocutory application by arguing that the application should not be granted because the application was not timely filed under MCR 7.205(A), that many of the issues raised in the application were not raised in the trial court, that the trial court resolved the issues in response to defendants’ first motion for summary disposition dated January 6, 2000, that defendants failed to file a timely application for leave to appeal from the trial court’s denial of their first motion on February 28, 2000, that defendants failed to set forth facts evidencing substantial harm as required by MCR 7.205(B)(1), and that defendants’ arguments lacked merit.

In an order entered on February 20, 2001, this Court granted defendants’ application, reversed Judge Grant’s order reinstating State Auto’s complaint, finding that “Plaintiff’s claims

against defendants are barred by MCR 2.613(B) and the doctrine of res judicata” because its lawsuit “effectively seeks to set aside or amend portions of an order issued by the Wayne Circuit Court on January 6, 1999.” State Auto moved for rehearing on March 8, 2001. This Court denied State Auto’s motion for rehearing on April 11, 2001.

Thereafter, State Auto filed an application for leave to appeal to the Michigan Supreme Court. By an order entered on November 20, 2001, the Supreme Court vacated this Court’s February 20, 2001 decision and remanded the case to this Court “for plenary consideration.”

II. Analysis

On appeal, defendants first argue that the Oakland Circuit Court lacked subject matter jurisdiction over plaintiff’s complaint on the basis that plaintiff’s action is barred by the doctrines of collateral estoppel and res judicata. Subject matter jurisdiction concerns the court’s power to hear a case. *Michigan Coalition of State Employee Unions v Civil Service Comm’n*, 236 Mich App 96, 109; 600 NW2d 362 (1999), rev’d in part on other grounds 465 Mich 212; 634 NW2d 692 (2001). Contrary to defendant’s claim, a court is not divested of subject-matter jurisdiction over the case just because the case may be barred by collateral estoppel or res judicata. *Id.*

In any case, plaintiff’s complaint is not barred by the doctrine of collateral estoppel. “Among the requirements courts have set out in order that collateral estoppel may apply are the following: ‘The issue to be concluded must be the same as that involved in the prior action. In the prior action, the issue must have been raised and litigated, and actually adjudged. The issue must have been material and relevant to the disposition of the prior action. The determination made of the issue in the prior action must have been necessary and essential to the resulting judgment.’” *City of Detroit v Qualls*; 434 Mich 340, 357; 454 NW2d 374 (1990), quoting 1B Moore, Federal Practice, ¶ 0.443[1], p. 759. In this case, collateral estoppel is not applicable because the relevant issue, while raised, was not actually adjudicated. As Judge Grant noted, while plaintiff raised the issue of its subrogation rights in Wayne Circuit Court, Judge Callahan refused to resolve it. Indeed, Judge Callahan specifically stated on the record that the issue of attorney fees and costs was “not before me” because no motion had been filed. Moreover, Judge Callahan advised State Auto’s counsel that “if Mr. Fieger takes an attorney fee and he’s not entitled to it, I’m perfectly capable of putting it back in your pocket.” Thus, collateral estoppel does not apply to this case.

Nor is res judicata applicable here. The doctrine of res judicata bars a subsequent action between the same parties or their privies when the facts or evidence essential to the action are identical to those essential to a prior action. The purpose behind the doctrine of res judicata is “to ‘relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication.’” *Pierson Sand and Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 380; 596 NW2d 153 (1999), quoting *Hackley v Hackley*, 426 Mich 582, 584; 395 NW2d 906 (1986). The doctrine applies to both findings of fact and conclusions of law. Res judicata requires that: 1) the prior action was decided on the merits; 2) the matter contested in the second case was or could have been resolved in the first; and 3) both actions involved the same parties or their privies. *Schwartz v Flint*, 187 Mich App 191, 194; 466 NW2d 357 (1991),

In this case, res judicata is inapplicable because neither plaintiff nor defendants were parties to the prior action, *Rogers v City of Detroit*. The parties to the prior action were Carol Rogers, personal representative of the Estate of John Rogers, the City of Detroit, City of Detroit Police Department and Keith Montgomery, an officer with the Detroit Police Department. Moreover, State Auto was not a party to the prior lawsuit, nor were the Fieger defendants, who merely represented the Estate in the prior suit. We note that while State Auto occupied the status of a lien-holder under MCL 600.303(1) with a right to intervene formally in the *Rogers* litigation, it never intervened in that action. This fact alone indicates that State Auto was not a party to the *Rogers* litigation. See *Michigan Bell v Short*, 153 Mich App 431, 435; 395 NW2d 70 (1986) (noting that the doctrine of res judicata was inapplicable [b]ecause Michigan Bell was never a party to the prior lawsuit" since its motion to intervene was denied by the trial court). Moreover, when plaintiff attempted to litigate this issue in *Rogers*, the record shows that Judge Callahan refused to address the issue, although he indicated that he would subsequently consider it in the event defendants withheld part of plaintiff's lien amount. Thus, res judicata is not applicable because neither the same parties nor their privies were involved in both actions.

Nonetheless, plaintiff's complaint in Oakland Circuit Court is barred on the basis of MCR 2.613(B), which provides:

Correction of Error by Other Judges. A judgment or order may be set aside or vacated, and a proceeding under a judgment or order may be stayed, only by the judge who entered the judgment or order, unless that judge is absent or unable to act. If the judge who entered the judgment or order is absent or unable to act, an order vacating or setting aside the judgment or order or staying proceedings under the judgment or order may be entered by a judge otherwise empowered to rule in the matter.

The purpose and application of MCR 2.613(B) is explained by Dean Longhofer, Michigan Court Rules Practice (4th Ed), §2.613.5, p 517, as follows:

If a judgment or order is to be set aside, vacated or stayed, it should normally be done only by the judge who made the judgment or order, since he or she is best qualified to pass upon the matter, and since it would obviously detract from the dignity and stability of judicial action if a dissatisfied litigant could run around seeking to have it upset by other trial judges. This is the sense of MCR 2.613(B), which was derived from a former statute. This language, however, does not preclude the issuance of a contradictory order in another action by another judge. If the doctrines of res judicata and collateral estoppel do not apply to the second action, MCR 2.613(B) does not limit the power of the second court, as any order entered by that court does not have the effect of "setting aside or vacating" the order of the first court.

Here, plaintiff's action in Oakland Circuit Court is barred by MCR 2.613(B) because the Oakland Circuit Court could not grant plaintiff relief without effectively reversing or vacating part of Judge Callahan's January 6, 1999 order. In that order, Judge Callahan specified the amount that plaintiff would receive in satisfaction of its collateral source lien and the amount which defendants would receive for their attorney fees in the *Rogers* case. Plaintiff's current lawsuit effectively seeks to set aside or amend those amounts by proceedings before a different

circuit court. Because Judge Callahan was still available and able to act, any such request for relief had to be brought before him. MCR 2.613(B); *Wilson v Romeos*, 387 Mich 664, 678; 199 NW2d 208 (1972) (construing GCR 1963, 529.2, the predecessor to MCR 2.613(B)); *Totzkay v DuBois (After Remand)*, 140 Mich App 374, 379; 364 NW2d 705 (1985). To hold otherwise is to reward forum shopping, contrary to the policies underpinning MCR 2.613, which “are to refer a motion to the judge most qualified to decide the motion and to prevent forum shopping.” *Liberty v Michigan Bell Telephone Co*, 152 Mich App 780, 783; 394 NW2d 105 (1986) (addressing an earlier version of the court rule). Accordingly, plaintiff’s proper avenue for relief is before Wayne Circuit Judge Callahan, rather than by a new lawsuit in a different circuit.

In this regard, State Auto is entitled to seek relief from Judge Callahan’s January 6, 1999 order under MCR 2.612(C)(1)(f) [“Any other reason justifying relief from the operation of the judgment”]. As already pointed out, although counsel for State Auto attempted to litigate the collateral source issue at the motion hearing on October 23, 1998 before Judge Callahan, he was informed by Judge Callahan that the issue was “not before me,” but that “if Mr. Fieger takes an attorney fee and he’s not entitled to it, I’m perfectly capable of putting it back in your pocket.” However, because State Auto was not provided with notice of the January 6, 1999 hearing, it did not attend the hearing to contest the disbursement award. However, at the hearing, Mr. Fieger, when questioning Mrs. Rogers, gave the court to understand that he “negotiated” the total of the collateral source amount of \$299,157.46 with State Auto. Given that counsel for State Auto had previously disputed Mr. Fieger’s entitlement to an attorney fee, it would appear that Mr. Fieger effectively misrepresented in open court that State Auto had negotiated with him that the amount of its lien was \$299,157.46. Under the circumstances of this case, plaintiff is thus entitled to seek relief from Judge Callahan’s order under MCR 2.612(C)(1)(f).

Accordingly, we reverse the Oakland Circuit Court order and opinion granting reconsideration and denying defendants’ motion for summary disposition, holding that plaintiff’s action in Oakland Circuit Court is barred by MCR 2.613(B) because the Oakland Circuit Court could not grant plaintiff relief without effectively reversing or vacating part of Wayne Circuit Court Judge Callahan’s January 6, 1999 order. Pursuant to our authority under MCR 7.216(7) and (9), we direct plaintiff to commence an action for relief from judgment pursuant to MCR 2.612(C)(1)(f) in Wayne Circuit Court and order Judge Callahan to consider this action on the merits.

Reversed.

/s/ Kathleen Jansen
/s/ Joel P. Hoekstra
/s/ Hilda R. Gage